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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 7th MEETING

Held at the Austria Center Vienna,
on Monday, 8 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

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The meeting was called to order at 9.45 a.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 4 (continued) (A/CONF.152/C.1/L.10)

1. Mr. SWEENEY (United States of America), introducing his delegation's proposal (A/CONF.152/C.1/L.10), explained that its purpose was to bring the provision into line with the language of other existing transport conventions. The words "if not inconsistent with the law of the country where the document is signed" appearing in the Commission's draft were, in his delegation's view, unnecessary.

2. Mr. ABASCAL (Mexico) strongly supported the proposal to delete the words "if not inconsistent with the law of the country where the document is signed", which he considered to be undesirable and indeed dangerous from the point of view of uniformity of the law. As to the rest of the paragraph, he supported the United States proposal, pointing out that it was based on the definition used in the United Nations Convention on International Bills of Exchange and International Promissory Notes of December 1989, the most recent of the United Nations Conventions in the field of international trade.

3. Mr. MORAN (Spain) and Mr. WALL (United Kingdom) also supported the proposal.

4. The CHAIRMAN said that, in the absence of any objection, he would take it that the Committee approved the United States proposal subject to such drafting changes as might be necessary in order to bring the wording completely into line with the text of the United Nations Convention on International Bills of Exchange and International Promissory Notes.

5. It was so decided.

Article 3 (continued) (A/CONF.152/C.1/L.38)

6. Mr. WALL (United Kingdom), introducing his delegation's proposal (A/CONF.152/C.1/L.38), said that the United Kingdom was somewhat concerned by the multiplicity of operations involved in the concept of delivery of the goods into the operator's charge, particularly in the light of the wording of article 1 (a) as approved by the Committee. Under the proposal, the only two factors determining the period of responsibility were delivery of the goods and their collection. In his delegation's view, there was no need to refer to the eventuality of the goods' not being collected in time.

7. Mr. MORAN (Spain) said that the proposal was a highly interesting one and deserved to be considered in relation to other parts of the draft Convention, and particularly articles 1, 4 and 10.

8. Mr. BONELL (Italy) said that he failed to see in what respect the proposed text was clearer than the Commission's draft.

9. Mr. SWEENEY (United States of America) said that he was in favour of keeping article 3 as it stood. To include the concept of "sole" charge would be tantamount to an invitation to allocate the operator's activities, at present more or less unified, among several individual corporations, each without assets or insurance. The result would be most undesirable. The term "delivers" did not necessarily

(Mr. Sweeney, United States of America)

connote physical delivery and was not in his view preferable to the concept of "taking in charge". As for the expression "hands them over", it did, perhaps, have stronger physical connotations than the expression "placed them at the disposal", but the latter was, in his view, a sufficiently close reflection of reality. He was unable to support the United Kingdom proposal.

10. Mr. RUSTAND (Sweden) remarked that the expression "placed them at the disposal" was preferable in that it offered the operator an opportunity to divest himself of responsibility without physically handing over the goods. He could not support the United Kingdom proposal, but would support the original text, which, in his view, would have been further improved by the Finnish amendments (A/CONF.152/C.1/L.36).

11. Mr. TARKO (Austria) noted that the United Kingdom proposal made a number of changes to the wording of article 3, some of which were of a substantive nature. In his view, rather than introducing the idea of the carrier or other person delivering the goods into the operator's charge, it would be preferable to speak of the operator taking them in charge, as in article 1. He could not support the insertion of the word "sole", since it could lead to disputes: the goods, for example, might not be in the "sole" charge of the operator, yet might be in his charge all the same, and he should therefore be responsible for them.

12. On the other hand, it was accepted that the responsibility of the operator did not end completely after the period during which he had taken the goods in charge. Under article 10 (1) he still had a right of retention over them after that period, but in exercising that right he was not free to do as he liked, so that in a sense his responsibility continued. Hence there was much to be said for the proposal to omit the words "or has placed them at the disposal of", since they might create a measure of uncertainty.

13. Mr. ROJANAPHRUK (Thailand) said that the omission of the words "or has placed them at the disposal of" in the United Kingdom proposal introduced a major change in the text of article 3. Its effect would be to extend the period of responsibility of the operator, which, in his view, was not justified. He was therefore in favour of keeping article 3 as it stood.

14. Mr. ZHAO Chengbi (China) noted the efforts of the United Kingdom delegation to define more closely the period of responsibility of the operator. The terms used in its proposal, however, were not exactly in line with those used in other articles. The term "take charge" had been extensively discussed at previous meetings and, despite its uncertainty, most delegations had accepted it for want of anything better. The United Kingdom proposal involved a substantive change in that it extended the period of responsibility of the operator until the goods were actually handed over to the person entitled to take delivery. The present wording, however, allowed for the possibility that that person might be represented by an agent and for that reason had been found, after much discussion, to be satisfactory by most delegations.

15. Mr. ROMAN (Belgium) said that he could agree to the first part of the United Kingdom proposal. The second part, however, raised certain problems, in that the operator would retain full responsibility for the goods even if he was unable to get rid of them. He was therefore against the proposal as a whole.

16. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that while it was true that as legal terms "take in charge" and "hand over" might be difficult to interpret in practice, all efforts to improve on them had been fruitless, and the present proposal was no more successful. Moreover, while the term used in article 3, "takes in charge", meant that attention was focused on the operator, the United Kingdom proposal shifted the emphasis to delivery by the carrier or other person, which could well create problems. In addition, in the second part of the proposal, the goods were only to be "handed over". The omission of the concept of "placing them at the disposal of the person entitled to take delivery of them" had important practical implications. The operator might not be in a position to hand over the goods and yet ought to be able to discharge his responsibility by making them available. Despite the valid problems raised by the United Kingdom, he therefore thought it would be better to stick to the present form of words.

17. Mr. SCHROCK (Germany) said that his delegation had always felt some uneasiness regarding article 3 and the term "take in charge". In the light of comments by previous speakers, however, he considered it preferable to keep the present text as it stood.

18. Mr. WALL (United Kingdom) said that the discussion had shown there to be real problems concerning the existing text of article 3 and the difficulty of arriving at clear definitions of responsibility. As the Committee had not felt it appropriate to seek such definitions, the area covered by article 3 was bound to become a source of major problems concerning the respective responsibilities of carrier and operator. The United Kingdom was particularly concerned about the casualness of the concept of "placing at the disposal"; to use such language would be tantamount to allowing the operator to disclaim responsibilty simply on the grounds that he had dumped the goods on the quayside and the person entitled to collect them had not turned up. The Convention as a whole did not necessarily confer indefinite responsibility on the operator; if the goods were not collected after a certain period of time, the operator could avail himself of other provisions of the Convention to dispose of them, but he ought to remain responsible for the goods until he had done so. His delegation remained very attached to the Finnish proposal, which, however, had been rejected, precisely because it sought to avoid the casualness of the idea of placing goods at someone's "disposal". In the circumstances it would withdraw its own proposal.

19. The CHAIRMAN accordingly took it that article 3 was approved.

20. It was so decided.

Article 1, proposals for new subparagraphs (continued)

21. Mr. WALL (United Kingdom), introducing his delegation's proposal (A/CONF.152/C.1/L.37) said that it concerned the definition of the word "person", used in his proposals for article 3 and article 4. It might be argued that, since his proposal for article 3 had not been accepted, there was no need to define the term "person". He felt, however, it would be preferable to defer discussion until after consideration of article 4.

22. The CHAIRMAN said that document A/CONF.152/C.1/L.37 would be considered after the United Kingdom proposal concerning article 4.

Article 5 (A/CONF.152/C.1/L.11, L.12, L.20, L.24, L.39, L.42)

23. Mr. SCHROCK (Germany), introducing his delegation's proposal to add a new paragraph (1 bis) (A/CONF.152/C.1/L.11), said that after consultations with the

(Mr. Schrock, Germany)

Australian delegation, it had been decided to insert the word "unsupervised" between the words "granted" and "access". As thus revised, the proposal was now submitted jointly by Australia and Germany. It stemmed from the fact that article 5 (1) on the "basis of liability" reversed the burden of proof concerning fault and neglect. In normal circumstances it was up to the claimant to prove that the loss he had suffered had been caused by the fault or neglect of the defendant. In the present article, the burden of proof had been reversed, as it had been in other transport conventions, because when something happened to goods in a ship or railway wagon, for example, it was the carrier who knew the facts of the matter, and not the shipper, consigner or consignee. That point of view, expressed in the conventions on carriage, was one he fully supported. In the case of transport terminal operators, however, especially in major sea ports, the factual situation could be quite different, because the goods would not necessarily be stored under lock and key. Sometimes it was necessary to grant the customer access to his goods so that he could inspect them or deal with them in some other way. In big sea ports it was not possible to install electronic monitoring or supervise all customers' visits. For practical reasons, customers were sometimes given unsupervised access to goods, and if the damage occurred when a customer had been granted such access, it could equally well have been caused by the terminal operator or by the customer. In that particular situation, therefore, he suggested a return to the general rule of law whereby it was the claimant who must prove fault or neglect.

24. Mr. SMITH (Australia) said that his delegation considered that the burden of proof should not be shifted where the operator had granted the customer or other persons access to the goods in question. That would be in line with recent decisions by English courts under the common law of bailment. He had suggested the insertion of the word "unsupervised" to cover cases where the operator retained control and supervision of the goods in question, again in line with English law.

25. Mr. FILIPOVIĆ (Yugoslavia) said that while national law on the subject varied, the intention behind the draft Convention was that the operator alone should bear liability, based on fault, with reversal of the burden of proof, and he was therefore opposed to the joint proposal.

26. Mr. BONELL (Italy) said that his delegation had difficulty in supporting the joint proposal. There was sufficient room in the formula "take all necessary measures that could reasonably be required to avoid loss or damage to the goods" to enable the operator to prove that he had done what was necessary when, for example, other people were present at the place where the goods were held, in particular the customer or his agent. His delegation accordingly thought that the proposal introduced an unnecessary complication.

27. With regard to the expression "at the time of the occurrence", he thought that it would be more appropriate to refer to the entire period during which the goods were under the responsibility of the operator.

28. Mr. ROMAN (Belgium) said that he could have supported the original German proposal. Since, however, the insertion of the word "unsupervised" placed the entire burden on the operator, his delegation would abstain in the vote on the joint proposal.

29. Mrs. EL OTMANI (Morocco) said that in her country, consignees frequently visited ports and had free access to the goods. Her delegation therefore thought it should be for the consignee to prove that there had been some kind of occurrence while the goods had been in the custody of the operator.

30. Mr. TARKO (Austria) said that article 5 (1) was quite flexible. Under the existing wording of the paragraph, it was possible for a judge to determine whether the operator had taken all the measures that could reasonably be required.

31. The expression "at the time of the occurrence" could give rise to difficulties since it might be difficult to determine when the loss, damage or delay had actually taken place. His delegation was therefore unable to accept the joint proposal.

32. Mr. RUSTAND (Sweden) said that, when the goods were inspected by the customer, it would be normal for a representative of the operator to be present to supervise matters and to protect his interests. In his view, therefore, the joint proposal was unnecessary.

33. Mr. HORNBY (Canada) said that if the customer or owner of the goods in question had been granted access to the area where the goods were stored, that would be a factor to be taken into account by the courts in determining whether or not the operator had taken all measures that could reasonably be required. His delegation could not, therefore, support the joint proposal, which would shift the burden of proof onto the claimant.

34. Mr. WALL (United Kingdom) said that, while his delegation did not oppose the proposal, it had some difficulty, for example, with regard to the word "customer". Who exactly was the customer, and what was his relationship to the operator, carrier, owner or despatcher? With respect to the expression "at the time of the occurrence", he thought that it might be more appropriate to say "during the period when the loss or damage occurred". It would be only realistic to recognize that there would probably be instances where the customer wanted to influence matters in his own interests. If the customer had an advantage in being allowed unsupervised access, he should not be able to use that advantage to the detriment of the operator. In those circumstances, the burden of proof should remain with the customer.

35. Mr. CHRISTOV (Bulgaria) said he was in favour of the proposal, since in his country's ports it was often the case that the customer did have access to the goods. He pointed out that there was a marked difference between the "Hague-Visby Rules" and the "Hamburg Rules" in that respect: in the former, the carrier, who corresponded to the terminal operator in the present case, simply had to prove that he had discharged all his responsibilities; he was not compelled to prove the occurrence of any loss or damage; in the latter, he was. Bearing in mind the actual situation that prevailed in practice, he would opt in favour of relieving the operator of the burden of proof.

36. Mr. OCHIAI (Japan) said he had some difficulties with the proposal in that it was based on the assumption that the customer and the claimant were one and the same person. If, however, they were not, and if there were no fault on the part of the claimant, he could not see why the latter should have the burden of proof imposed on him.

37. Mr. LARSEN (United States of America) said he too preferred the existing text. The proposal was introducing an evidentiary rule over and above the basic principle of liability enshrined in the Convention. In trying to deal with one specific set of circumstances, it created a shift in the burden of proof which raised as many questions as it tried to solve. In the event of an occurrence resulting in loss, the operator already had a defence, in that he could show that he had taken all reasonable care to protect the goods. He would also have a defence under article 3, in that if the customer had taken possession of the goods to inspect, treat or handle them, the operator would no longer be responsible.

38. Mrs. PIAGGI DE VANOSSI (Argentina) said she too had difficulties with the proposal; in practice, it might be difficult to prove that the customer, or persons acting on his behalf, had been granted access to the area concerned at the time the loss or damage had actually occurred.

39. Mr. SCHROCK (Germany) said the joint proposal was not intended to cover some hypothetical situation, but the real situation currently existing in transport terminals, as reported by the industry and as confirmed by himself through personal visits. He could accept the United Kingdom suggestion that the phrase "during the period when the loss or damage occurred" should be substituted for the word "occurrence" in the first line of the proposal.

40. Ms. SISULA-TULOKAS (Finland) believed the situation was already taken care of in paragraph (1) of the article by the phrase "all measures that could reasonably be required". If the proposal were accepted, it would be very unwise for the customer to ask to inspect the goods; on the contrary, it would be wise for him to make clear that he did not wish to have any access to them at all.

41. Mr. BELLO (Philippines) said that while he understood the concern of the sponsors of the proposal about unsupervised access by customers, it should be remembered that such access, although unsupervised, would have been granted by the operator, so that the customer would not be an interloper or trespasser. A shift in the burden of proof could not be made on the basis of mere speculation that there was a causal link between unsupervised access and the occurrence that had caused damage.

42. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said he preferred the existing text. In the event of such an occurrence, it should be for the operator to adduce the necessary evidence to show that he was not to blame for the damage that had been done.

43. Mr. MUTZ (Observer, Central Office for International Railway Transport) said he shared the doubts expressed as to whether the provision could be applied in practice, since normally access would be supervised. Determining whether or not access had been supervised would usually amount to the same thing as determining whether or not all reasonable precautions had been taken to protect the goods.

44. The CHAIRMAN invited the Committee to vote on the joint proposal (A/CONF.152/C.1/L.11).

45. The proposal was rejected by 27 votes to 4, with 4 abstentions.

46. The CHAIRMAN suggested that a further proposal relating to article 5, submitted by Spain (A/CONF.152/C.1/L.20), which concerned a drafting point, could be transmitted to the Drafting Committee.

47. It was so agreed.

48. Mr. SOLIMAN (Egypt) introduced his proposal relating to article 5 (2) (A/CONF.152/C.1/L.42). In practice it might be difficult to prove how far the loss sustained was or was not attributable to failure on the part of the operator.

49. Mrs. EL OTMANI (Morocco) supported that proposal. It was likely to be difficult to prove anything so essentially uncertain as to the extent to which loss or damage was attributable to this or that cause.

50. Mr. BONELL (Italy) said some misunderstanding might have arisen owing to the fact that paragraph (2) was worded in a somewhat negative way. In fact, what was at stake was not a negative factor, but a positive factor, namely, the amount of loss attributable to one cause as distinct from another. Under the principle of contributory negligence, the operator's liability would be limited to the loss or damage he had in fact caused.

51. Mr. FILIPOVIĆ (Yugoslavia) shared that view. Although the concluding phrase of paragraph (2) was negative in tone, in fact it would be for the operator to prove his own part in the causation of the matter, and thus the proof required would be positive rather than negative.

52. Mr. OCHIAI (Japan) said he had some difficulties with the proposal. Since the wording used in the concluding phrase of the paragraph in the Commission's text was the same as that used in paragraph 7 of article 5 of the Hamburg Rules, as well as in article 17 of the Multimodal Transport Convention, he would prefer to see it kept.

53. The CHAIRMAN invited the Committee to vote on the Egyptian proposal (A/CONF.152/C.1/L.42).

54. The proposal was rejected by 20 votes to 7, with 7 abstentions.

55. Miss VAN DER HORST (Netherlands), introducing her delegation's proposal to add a new paragraph to article 5 (A/CONF.152/C.1/L.24), said that at the moment the draft Convention contained no specific provisions as to consequential damages. The UNCITRAL Working Group, in the preparatory discussions, had concluded that it would be for national law to determine whether the operator should be made liable for such damages, a conclusion which could mean that operators were liable in one State, but not in another. Now that an attempt was being made to unify the rules on operator liability, it would perhaps be advisable to include a provision in the Convention making it clear that consequential damages could not be recovered.

56. Ms. JØRGENSEN (Denmark) supported the Netherlands proposal, but would prefer it to be incorporated into article 6.

57. Mr. RUSTAND (Sweden) drew attention to his Government's comment (A/CONF.152/7/Add.1, p. 12) that it was not clear whether the word "loss" in paragraph (1) was to be taken as including consequential loss, and that as a result the extent of the operator's liability was uncertain. In principle, his delegation supported the proposal, although it doubted that any firm conclusion could be reached at such a late stage. For the present, it wished to reserve its position.

58. Mr. LARSEN (United States of America) shared that view. The point had already been sufficiently debated in the Working Group, where the point had been clarified, and the addition proposed by the Netherlands was unnecessary.

59. Mr. ABASCAL (Mexico) said that while he could agree to the principle that article 5 should cover consequential damages, he believed that the addition proposed by the Netherlands would be unduly restrictive in regard to the limits provided for under article 6. Accordingly, he could not support the proposal.

60. Miss VAN DER HORST (Netherlands) said the position was somewhat confused. Some delegations appeared to be in favour of making the operator liable for consequential damages, and others did not. It would perhaps be best to let the matter be decided by national authorities. She would therefore withdraw her delegation's proposal.

The meeting rose at 12.25 p.m.